United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-2021

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner-Appellee,

-against-

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent-Appellant.

75-2021

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellant
Office & P.O. Address
Two World Trade Center
New York, New York 10047

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PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent.

74 C 1173

----------X

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA ex rel ROBERT W. LLOYD :

Petitioner :

- against - :

LEON J. VINCENT, Superintendent Green Haven Correctional Facility :

Respondent :

- - - - - - - - - - - - - - - - - - - -x

74C 1173

PETITION FOR A WRIT OF HABEAS CORPUS

I (Jurisdiction)

This is an application for a writ of habeas corpus to relieve the Relator of an illegal conviction imposed upon him by the State of New York in violation of the Constitution of the United States. A United States District Court is authorized to entertain the application by 28 USC §2241(a).

II (Parties)

Relator is a citizen of the United States and a resident of the State of New York. Relator is currently incarcerated in the Green Haven Correctional Facility in New York in the custody and control of Respondent, Leon J. Vincent, Superintendent of said institution.

III (Circumstances of Crime and Trial)

(a) On February 2, 1972 two undercover narcotic agents allegedly purchased heroin from the Relator.

(b) On September 5, 1973 after selection of the jury but before any testimony had been taken the District Attorney

(1)

moved to have the public excluded from the courtroom during the testimony of Patrolman Carroll and Sampson, undercover agents in the Nassau County Police Department.

(c) Over strenuous objection of defense counsel such motion was granted and the courtroom was closed on September 5th and 6th while these two officers testified.

IV (Claim)

(a) Relator contends that he was deprived of his right to a public trial.

V (Exhaustion)

Petitioner has exhausted all available state remedies (see attached exhibits) and no previous petition for a writ of habeas corpus has been filed in this matter.

WHEREFORE, petitioner respectfully requests that:

1. A writ of habeas corpus be directed to respondent.

2. Respondent be required to appear and answer the allegations of this petition.

3. Petitioner be relieved of the unconstitutional conviction and be discharged from custody.

4. Petitioner be allowed such other, further and alternative relief as may seem just, equitable and proper under the circumstances.

Respectfully submitted,

EUGENE MURPHY

State of New York
Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

ROBERT W. LLOYD,
Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 2, 19 74

Charles D. Breitel
Chief Judge

James J. McDonough, Esq.
Legal Aid Society of Nassau County
400 County Seat Drive
Mineola, New York

Hon. William Cahn
District Attorney, Nassau Co.
Court House
Mineola, New York

Clerk, Court of Appeals

*Description of Order:

5-30-74 App. Div. 2nd Dept. affmd. 10-19-73 Co. Ct., Nassau Co.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 28, 1974.

HON. HENRY E. LATHAM, Acting Presiding Justice,
HON. JOHN P. COHALAN, JR.
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER
Associate Justices

The People of the State of New York,

Respondent,

v.

Robert W. Lloyd,

Appellant

Order on Appeal from Judgments of Conviction

In the above entitled action, the above named Robert W. Lloyd, defendant in this action, having appealed to this court from two judgments of the County Court, Nassau County, rendered October 12, 1973 and October 19, 1973, respectively;

and the said appeal having been argued by Eugene Murphy, Esq., of counsel for the appellant, and argued by Jules E. Cronstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the two judgments appealed from are hereby unanimously affirmed.

Enter: IRVING N. SELKIN

Clerk of the Appellate Division

FILED

To be Argued By:
EUGENE MURPHY

AUG 9 2 45 PM '71

CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel
ROBERT W. LLOYD

74 C 1173

Petitioner :

-against- :

LEON J. VINCENT, Superintendent Green Haven Correctional Facility :

Respondent :

- -x

RELATOR'S MEMORANDUM OF LAW

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York
(516) 248-5782

OF COUNSEL:

MATTHEW MURASKIN
EUGENE MURPHY

(2)

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel ROBERT W. LLOYD :

Petitioner :

-against- :

LEON J. VINCENT, Superintendent Green Haven Correctional Facility :

Respondent :

- -x

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This memorandum is submitted in support of the present petition for habeas corpus relief pursuant to 28 U.S.C. §2241. The questions arising in the instant application involve the denial of relator's constitutional rights in that he was deprived of his right to a public trial.

STATEMENT OF FACTS

TRIAL

PATROLMAN KNORLAND CARROLL of the Nassau County Police Department testified that for the last four years he had been an undercover agent with the Narcotics Bureau (96-98).

On February 2, 1972 he together with Patrolman Sampson went to 18 Seaman Avenue, Hempstead with the intention of buying drugs from James Johnson or J.J. (100) from whom he had previously bought cocaine (111;113;273). They arrived about 5:15 P.M. and were there less than or about five minutes (199-200;232). As a result of his conversation with J.J. he and Sampson proceeded to Maple and Laurel Streets in Hempstead arriving about 5:40 P.M. (97-98;101). Upon his knocking, defendant opened the door to apartment 2E (99-102). He had previously on several occasions seen defendant in the area of Campbell Park and knew where he lived (115;217-218; 258;334).

He had come to know the defendant through various contacts including Patrolman Mickel, Walsh and Gardner (246-247; 256). Defendant had been arrested by error on a warrant issued for another Robert Lloyd living in Rockville Center and Long Beach (249-252). At the time of the arrest narcotics had been picked up (255). He viewed defendant through a one-way mirror on that day (257-258;332).

They stepped into a small hallway and to the left was a hallway going into the kitchen with another room behind it

which he believed to be a bedroom; to the right was a living room and straight ahead was a wall (262-263). He saw two children watching television in the living room and a woman reading in the kitchen (121-122)

He told defendant that they had been sent by J.J. who had said that he didn't have anything but that "my man, Bobby Lloyd, has something over there and we are doing the same thing; but I am out and he should have something." (102-103; 115-116). Defendant replied that it was out of the same stash but that he had only his private stash left and of that he had only two things (116;118;270). Defendant said he was selling 20 cent bags of coke and told them to wait (115;118). Defendant left and returned with two tin foil packets containing a white substance, one each of which he gave to him and Sampson for $20. a piece (118-119). Having been there less than 5 minutes, they left (303-304).

They travelled to Police Headquarters where they placed the packets in Scientific Investigation Bureau envelopes, wrote information on them, initialled them, made accompanying forms and placed them in S.I.B. locker #1 at 6:23 P.M. (120;132).

Two weeks later he again did business with J.J. (274). His part of the investigation lasted from July, 1971 to April, 1972 and in May, 1972 his evidence was presented to the Grand Jury (346).

PATROLMAN JOSEPH E. SAMPSON of the Nassau County Police Department testified that he was an undercover agent working

with the Narco cs Bureau (347-348). On February 2, 1972 he and Carroll had a conversation with J.J. as a result of which they went to apartment 2E, Laurel Street Apartments in Hempstead (348-350). Upon their arrival at approximately 5:40 P.M. Carroll knocked on the door, which defendant opened (351). They entered and he stood in the living room while Carroll and defendant spoke in the hallway (351).

Upon entering he had first been in a hallway which went straight down to the left (364;388). The livingroom was to to the right and down the hallway; on the left was first the kitchen and then some other rooms (364; 379). Directly opposite the door was a wall (378).

He remained standing in the opening to the living room in which two children were watching television (364). A female was in the kitchen (364) She was defendant's wife Irene whom he knew, having graduated with her from highschool (371-372). He had not seen her since high school but they had friends in common (372-373). He had seen defendant before over the period of a couple of years (366). He knew they were married (376).

Carroll told the defendant that they had been at J.J.'s home, that J.J. had said he was out of stuff but that he was doing stuff with defendant, who was his partner (388). J.J. had told them that defendant should have some stuff (388). Defendant said he had only his personal stash, but that since J.J. had sent them, he would do them some (388). Carroll agreed to 20 cent things (388). Defendant left the room, came back and handed Carroll and him pieces of tin foil and they gave defendant $20 each (351-352).

They left, went to the Narcotics Bureau and placed the evidence in a Property Bureau envelope and locked it in locker #1 at the Scientific Investigation Bureau (353-354).

Although he had lived in Hempstead since he was twelve and had gone to Hempstead High School, very few people knew him to be a policeman (374-376).

Upon being recalled he testified that he had moved from Virginia Avenue in Hempstead, where his mother still lives, in 1966 (548; 554). He lived two miles away until he moved out of the Hempstead area in 1970 (549-550).

DETECTIVE FRANK L. MAURO of the Scientific Investigation Bureau of the Nassau County Police Department testified that on February 3, 1972 he removed People's 1C and 1B from locker number one at the Scientific Investigation Bureau (414-415). He found two tin foil packets containing a white substance (416-417). He performed tests and determined that substance to be cocaine (417-421).

ROBERT W. LLOYD testified that he resides at 199 Alabama Avenue in Hempstead (457). He had known Sampson for about 17 years (458). He was a good friend of Sampson's sister Joyce (458). His wife had gone to high school with Sampson who lived a block and a half away and was known to him to be a policeman (458-459).

His circle of friends knew that Sampson was a policeman, that fact being common knowledge in the neighborhood (460-461). His son's godfather who lived on the same street as Sampson had told him Sampson was a policeman (461).

He had seen him around Hempstead and had seen the other officer around Campbell Park (463). He had also seen the other officer at the police station when he identified defendant as the wrong man (463-464;474).

He did not live at 71 Laurel Avenue after his arrest in December, 1970 since he had his wife were separated as of that date (470). His wife continued to live at that address and he went there to visit his children (470-471).

He was not at 71 Laurel on February 2 (472; 482). He was arrested there in May, 1972 at about 10 A.M. by Walsh, Mickel and a few others (475; 477; 485-486).

Upon opening the door to the apartment, one sees into the kitchen (471). There is a closet on the right of the door and the next opening is for the living room on the right (471). There were no rooms to the left (471-472).

He had been convicted of petit larceny at age 19, fourteen or fifteen years ago and was fined $50 (483; 512-513). On February 20, 1972 he was sentenced to 15 days in the County Jail (483-484).

He knew that J.J. Johnson dealt in drugs (491). Gail Jones who was J.J.'s girlfriend was with him on May 10, 1972 when he was arrested (501-503).

Gail Jones testified that she was a girlfriend of the defendant, knows Joe Sampson and knows him to be a policeman (521-522). She went to high school with him, graduating one

year after he did (522). She used to see him twice a week around the area of Virginia Avenue about two blocks from Alabama Avenue where she had previously lived (521). In December of 1970 she and defendant were arrested at her apartment (524-525).

IRENE LLOYD testified that she was the wife of the defendant from whom she had separated a couple of years before February, 1972 (533; 535). She lived at apartment 2E, Laurel Apartments where defendant often came to visit the children (540-541). In February, 1972 he came to the apartment between 10 and 20 times (541).

That apartment had the following physical layout : opening the door one sees a large hall straight ahead, down which is the living room to the right and a bit further the kitchen on the right (534).

She knew Joe Sampson having gone to high school with him, although she had not seen him since high school (537-538; 543).

PATROLMAN CARL MICKLE of the Nassau County Police Department testified that on May 11, 1972 he was given a warrant to execute at Apartment 2E, 71 Laurel Avenue in Hempstead (556-557). He arrived there, obtained a passkey from the custodian or manager and entered the apartment consisting of 3 or 4 rooms, off to the right was a long hallway and a bedroom in the rear (558-559). He found the defendant sleeping in the bedroom in his underwear and no one else

in the apartment (558-559). He took defendant to the stationhouse and processed him (559-560). When he asked defendant where he lived, defendant replied Apartment 2E, 71 Laurel Avenue, Hempstead (611).

HUNTLEY HEARING

PATROLMAN MICKLE testified that upon arresting defendant at about 10 A.M. he read defendant his rights from a departmental card (567; 593-594; 599). He read only the warning side and not that containing the waiver (601). He told defendant his rights because there was contraband involved (597). Defendant said nothing (567-568). He asked defendant if he understood and defendant said he did (602). Defendant did not reply when asked if he was willing to answer questions without a lawyer (602).

At Narcotics Headquarters he had a conversation with the defendant and prepared form 81, defendant's pedigree at about 10:30 (568-569; 571). It was typed in the regular course of Police Department business and was prepared from answers given by defendant in response to his questions (569). He asked defendant his address, the names of his children, father and mother and questions of that nature, but did not go into the facts of the matter (598).

VERDICT AND SENTENCE

On September 10, 1973 defendant was convicted of two counts of criminally selling a dangerous drug in the third degree.

On October 12, 1973 defendant was sentenced to an indeterminate sentence of imprisonment with a maximum of four years on one count.

On October 19, 1973 defendant was sentenced to an indeterminate sentence of imprisonment with a maximum of four years on the other count to be served concurrently.

On May 28, 1974 the Appellate Division, Second Department affirmed the conviction.

POINT ONE

RELATOR WAS DEPRIVED OF HIS RIGHT TO A PUBLIC TRIAL

During almost all of the People's case the public was excluded from the courtroom in which relator was being tried. No sufficient basis for such exclusion was presented to the trial court and the action was therefore an unconstitutional restriction on relator's right to a public trial.

> The requirement of a public trial required by the Sixth Amendment has been incorporated into state court proceedings by the Fourteenth Amendment. United States ex rel Laws v. Yeager, 448 F.2d 74,80 (3rd Cir.,1971); United States ex rel Bennett v. Rundle, 419 F.2d 599, 604 (3rd Cir.,1969).

The state defendant is entitled to a public trial under the Federal Constitution and a violation of that right can result in the granting of a writ of habeas corpus by the Federal Court, United States ex rel Bennett v. Rundle, supra.

The right to a public trial is clearly not absolute. Some or all of the spectators may be excluded from the courtroom for certain specified reasons.

> Thus the exclusion of the public in whole or in part has been found constitutionally acceptable where it was deemed necessary to protect the defendant, Sheppard v. Maxwell, 384 U.S. 333 ...; Estes v. Texas, 381 U.S. 332 ..., where there has been harassment of witnesses, United States ex rel Bruno v. Herold, 408 F2d 125 (2nd Cir., 1969), cert. denied 397 U.S. 957... or to preserve order, United States ex rel Orlando v. Fay, 350 F2d 967 (2nd Cir., 1965) cert. denied, 384 U.S. 1008...United States v. Bell 464 F2d 667, 670 (2nd Cir.,1972).

Relator contends however that in his case none of these bases for exception to the rule of an open trial was present or demonstrated.

The offered explanation for the closing of the courtroom was that the action was necessary to protect the confidentiality of police undercover agents. However on this vital issue of public trial no testimony or evidence was received to support the district attorney's claim of such necessity. (See attached pages of transcript).

The issue then is not really whether the courtroom may be closed to conceal the identity of a narcotic agent but more simply whether such can be done without a showing of need therefor.

The rule has long been that

> the Sixth Amdnement precludes the general indiscriminate exclusion of the public from the trial of a criminal case in a federal court over the objection of the defendant and limits the trial judge to the exclusion of those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them. United States v. Hobli, 172 F2d 919, 923 (3rd Cir.,1949).

As a result of the significance of this right it has been extended to pre-trial hearings. United States v. Ruiz-Estrella, 481 F2d 723 (2nd Cir., 1973); United States v. Clark, 475 F2d 240 (2nd Cir.,1973).

The latter case pointed out that the right to a public trial is two-fold - protecting the defendant from star-chamber proceedings and insuring to the public an opportunity to

monitor the operation of its judicial and law enforcement officers.

These two cases are important further because of the limits they place on United States v. Bell, 464 F.2d 667 (2nd Cir., 1972). In the Bell case the trial court's action in clearing the courtroom while an official testified as to the details of the 'hi-jacker profile' was approved as essential to protection of the air-travelling public. In both Ruiz-Estrella and Clark the same rationale for exclusion was offered and accepted by the trial judge. The Court of Appeals reversed in both cases because only a small portion of the testimony from which the public was excluded involved the profile.

There may be cases in which the state court can exclude the public while narcotic agents are testifying, People v. Hinton, 31 N.Y.2d 71, but such exclusion cannot be automatically or routinely granted. In Hinton itself the Court of Appeals held the action proper because

> (1) the undercover agent was still operating actively in the community; (2) that other narcotic investigations were pending; (3) that other targets in the narcotics investigations were present in the courtroom, thus jeopardizing the agent's life if his identity were exposed. at 73.

In our case no evidence of any of these factors was offered. On the contrary, it was shown that the agents' investigation in Hempstead had terminated. (346) The concrete danger to an agent's life is clearly distinguishable from a

vague concern about his confidentiality. The state must be required to prove a real need before being permitted to restrict the defendant's right to a public trial.

CONCLUSION

THE APPLICATION SHOULD BE GRANTED AND THE WRIT ISSUED

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York
(516) 248-5782

OF COUNSEL:

MATTHEW MURASKIN
EUGENE MURPHY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent
Green Haven Correctional Facility

Respondent.

No. 74 C 1173

ORDER TO SHOW CAUSE

Upon the petition for issuance of a writ of habeas corpus, dated August 8, 1974, a copy of which is attached, it is ORDERED that:

(1) The Attorney General of the State of New York, as attorney for the Respondent, show cause before this Court on Friday, October 25, 1974 at 11:30 A. M., by the filing of a return to the petition, why a writ of habeas corpus should not be issued;

(2) Within thirty (30) ~~ten (10)~~ days of receipt of this order, the Attorney General of the State of New York shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court;

(3) If the transcript of the trial be available, the Attorney General of the State of New York is directed to submit such transcript and record to this Court at the time of the filing of such return;

(4) Petitioner, within ten (10) days of the receipt by him of a copy of the return of the Attorney General, shall file his reply, if any, with the Clerk of this Court, in duplicate;

(5) Service of a copy of this order shall be made by the Clerk of this Court by mailing a copy thereof, together with a copy of the petition, to the Attorney General of the State of New York, 80 Centre Street, New York, N. Y. 10013 and by mailing a copy of this order to the petitioner.

Dated: Brooklyn, New York,
September 23, 1974

Jacob Mishler
JACOB MISHLER, U.S.D.J.

(3)

LEWIS ORGEL
CLERK

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK
EASTERN DISTRICT OF NEW YORK
U. S. COURT HOUSE
BROOKLYN, NEW YORK 11201

September 23, 1974

...ERK'S OFFICE
...CT COURT E.D. N.Y.
SEP 24 1974
TIME A.M.
P.M.

James J. McDonaugh, Esq.
Legal Aid Society of Nassau
400 County Seat Road
Mineola, New York

Re: U.S.A. ex rel. Lloyd -vs- LeonJ. Vincent, etc. 74 C 1173

Dear Sir:

I enclose a copy of the order to show cause dated September 23, 1974 which is self explanatory.

Very truly yours,

LEWIS ORGEL
CLERK OF COURT

BY: _____
THOMAS B. COSTELLO
CHIEF DEPUTY CLERK

Encl.
cc: Attorney General-State of New York

(4)

Tucker Ct. I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent.

AFFIDAVIT

74 C 1173

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BURTON HERMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent. I make this affidavit in opposition to the petiton for writ of habeas corpus.

On October 19, 1973, at a term of the County Court, Nassau County (Lockman, J.), petitioner was sentenced to state prison for two concurrent four year terms after being convicted of two counts of criminally selling a dangerous drug in the third degree by the verdict of a jury. The judgment of conviction was affirmed 44 A D 2d 912. Leave to appeal to the New York Court of Appeals was denied. I herewith submit copies of pages 86-96 of the minutes of trial (the portion which relates to his claim that he was deprived of his right to a public trial) and the briefs submitted by both sides to the Appellate Division, Second Department.

(5)

The prosecutor made an application to close the court to spectators during the testimony of the two undercover agents. The application was granted. In deciding the motion the trial judge took into account the confidentiality of the two undercover agents, the danger to their lives and the continuing investigation that they were undertaking (p. 94). These considerations provided adequate reason for the exclusion order. See People v. Hinton, 31 N Y 2d 71; cert. den. 410 U.S. 911.

The two agents were actively involved in pending cases and the court's intention was to protect against t e risk of disclosure of their identity. Members of the public who might otherwise have been in the courtroom could include members of the neighborhood where the agents were still operating. This could not only endanger their lives, but ruin their effectiveness in the community (Respondent's brief, pp. 18-19).

Moreover, the need for the exclusion order here is similar to the necessity which existed in United States v. Bell, 464 F. 2d 667 (2d Cir. 1972), cert. den. 409 U.S. 991. In Bell the need to facilitate law enforcement and to protect the public (from skyjackers) was regarded as a sufficient rationale for the order. Similarly in the present case, the need to facilitate law enforcement and to protect the public (from sellers of narcotics) should be considered adequate justification.

The exclusion order was a sound exercise of the court's discretion. There was only one lady present in the courtroom at the time (pp. 88-89). As it was stated in United States ex rel. Laws v. Yeager, 448 F. 2d 74, 81 (3rd Cir. 1971):

> "It should be noted that the exclusionary order in Bruno [United States ex rel. Bruno v. Herold, 408 F. 2d 125 (2d Cir. 1969); cert. denied 397 U.S. 957] was much broader than the order in the instant case where the judge excluded only one spectator during the cross-examination of one witness.

'Here at most there was a single incident which at best could be likened unto discretionary courtroom "housekeeping."' 408 F. 2d at 129. We conclude that the removal of Mrs. Kingsley was a sound exercise of the trial judge's discretion."

Defendant objected to the exclusion order merely on the basis that he had an "absolute right to have a public trial." (pp. 87; 89). The contention was erroneous. See United States ex rel. Orlando v. Fay, 350 F. 2d 967, 970 (2d Cir. 1965), cert. denied sub nom, Orlando v. Follette, 384 U.S. 1008 ("Judge Sugarman rejected Orlando's contention that the exclusion of the spectators was itself a violation of due process by reason of the Sixth Amendment guarantee of a 'public trial'") United States v. Ruiz-Estrella, 481 F. 2d 723, 725 (2d Cir. 1973) ("[In Bell] ... the rights of the defendant involved, while surely important, were not absolute.") De Champlain v. McLucas, 367 F. Supp. 1291, 1296 (D.C. Col. 1973) ("...the Sixth Amendment right to a public trial is not absolute...") United States ex rel. Smallwood v. LaVallee, 377 F. Supp. 1148, 1151 (E.D.N.Y. 1974) ("The right to a public trial is not a limitless imperative").

These were not secret proceedings of the sort condemned in In re Oliver, 333 U.S. 257 (1948); See Lacaze v. United States, 391 F. 2d 516, 521 (5th Cir. 1968); United States ex rel. Orlando v. Fay, 350 F. 2d 967, 971 (2d Cir. 1965); Geise v. United States, 262 F. 2d 151 (9th Cir. 1958).

WHEREFORE, the petition should in all respects be denied.

Burton Herman
BURTON HERMAN

Sworn to before me this
18th day of October, 1974

Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel ROBERT W. LLOYD :

Petitioner :

-against- : 74-C-1173

LEON J. VINCENT, Superintendent Green Haven Correctional Facility :

Respondent :

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

EUGENE MURPHY, being duly sworn, deposes and says that:

1. He is the attorney for relator and represented him in the appellate courts of New York.

2. He makes this affidavit in support of relator's application for a writ of habeas corpus.

3. In the Appellate Division deponent raised the following points on relator's behalf:

(1). It was reversible error to deprive defendant of a public trial

(2). Evidence of other crimes of defendant and his associates was improperly admitted

(3). Testimony as to over-all narcotics investigations was improperly admitted.

(Attached as Exhibit A is a copy of the table of contents of the brief submitted).

4. On June 25, 1974 a hearing was held before Chief Judge Breitel of the New York Court of Appeals on relator's application for leave to appeal to the Court of Appeals. The main subject of discussion was the issue of deprivation of a public trial.

(6)

5. As a result of that discussion the attached letters to Judge Breitel from the District Attorney (Exhibit B) and deponent (Exhibit C) were sent.

6. On July 2, 1974 Judge Breitel denied leave.

WHEREFORE deponent feels that all state remedies on the issue of a public trial have been exhausted.

EUGENE MURPHY

Sworn to before me this
19th day of September, 1974.

Lorraine Hughes

LORRAINE HUGHES
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Certificate filed in [illegible] County
Commission Expires March 30, 1975

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"EXHIBIT A"

WILLIAM CAHN
DISTRICT ATTORNEY

THE OFFICE OF THE DISTRICT ATTORNEY
OF
NASSAU COUNTY
262 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501
TELEPHONE (516) 535-4800

June 28, 1974

Hon. Charles D. Breitel
Chief Judge
Court of Appeals
74 Trinity Place
New York, N.Y.

Re: People v. Robert W. Lloyd

Dear Chief Judge Breitel:

A hearing was held in connection with an application by the above entitled defendant for leave to appeal to the Court of Appeals before you on Tuesday, June 25, 1974. One of the issues has to do with the exclusion of the public from the courtroom while the undercover narcotics detective testified.

Enclosed you will find a memo prepared by a Trial Assistant regarding a situation that took place recently during the trial of a narcotics case in the Nassau County Court before the Hon. Alexander Vitale. The report speaks for itself and demonstrates why this office favors excluding the public where an undercover agent is testifying in a narcotics case.

We follow the general rule that the defendant, at this stage of the case, is entitled to the comfort of his relatives or close personal friends. On the other hand, to throw open the court to total strangers creates a special danger and risk for the undercover agent. Moreover, as you will see, it represents an unnecessary risk or danger that on-going investigations will be compromised. Admittedly we do not follow this rule unless the undercover agent is still operating in the field and taking part in an on-going investigation.

"EXHIBIT B"

Judge Vitale, I am sure, would be familiar with this situation and also Lieutenant Donald White of the Narcotics Squad and First Deputy Chief of Detectives Albert Owens.

Very truly yours,

WILLIAM CAHN
District Attorney

Henry P. DeVine
Assistant District Attorney

HPDV:ms
enc.

COUNTY OF NASSAU

Inter-Departmental Memo.

To : HENRY DEVINE, First Assistant District Attorney

From : MICHAEL M. PREMISLER, Assistant District Attorney

SUBJECT: PEOPLE vs. RICHARD GREINER
Indictment #34682

I have been asked to outline for you the events in the above-captioned matter relating to the show-up in which witnesses for the defense were allowed to view two undercover agents from the Nassau County Police Department Narcotics Bureau after the officers had testified, but before the witnesses were called to take the stand. The case involves one sale of marijuana to Officer Young, who was working undercover for the Nassau County Narcotics Bureau, on December 18, 1971. His partner was Officer Mulcahy. The sale took place inside the Princess Bar at Broadway, Hicksville, Nassau County, New York.

Officer Young had been working this location for some time, had made numerous buys there, and was in the process of setting up other contacts and buys. He was known to many of the people in the bar and had as of yet not testified as to any sales which had taken place at this location. Officer Mulcahy was new at this particular location.

The defense claimed that the defendant was at the bar but at no time sold marijuana to anyone. They stated that they had four witnesses who would testify to being present at that location with the defendant all that evening and that at no time did he sell marijuana to anyone. Two of these witnesses were stationed at the door for the purpose of checking I.D.'s and keeping their eyes on the patrons. One of these was the defendant's brother and one of the others was the defendant's girlfriend.

Upon my application, the Court directed that during the testimony of the two undercover agents, the courtroom would be sealed and that no one would be present other than the defense attorney and his staff, the defendant and the press. The defense objected, claiming that their witnesses had the right to confront the undercover agents. The defense stated that the

witnesses wanted to see the undercover agents to determine whether they had seen them in the bar that night and whether in fact the defendant at any time sold them marijuana.

After initial objecting to any kind of face-to-face confrontation, I consented to a line-up in which the two undercover agents would be present among six to eight other people. The Court, however, preferred and ruled that there would be a show-up. At the conclusion of the People's case, both undercover agents were brought into the courtroom and the defendant's four witnesses were brought in and allowed to look at the officers. In the words of the Court, they looked "eyeball to eyeball". The show-up lasted a few minutes. It is important to note that prior to the show-up the witnesses had not been called or sworn. There had merely been an offer of proof by the defendant's attorney in which he stated that the witnesses would testify that at no time did the defendant sell marijuana to anyone, and that they wanted to see if they recognized these individuals as having been in the bar that night.

In talking to the undercover agents, they explained to me that they knew the four witnesses for the defendant; that Officer Young had been negotiating a buy of a substantial amount of marijuana from one of the witnesses and that on previous occasions another of the witnesses had been present when other buys and transactions occurred. The defendant's brother had a criminal history of drug-related problems and the female was known to the officers as a user of marijuana and narcotics. After viewing the two officers, three of the defendant's witnesses left never to appear again in Court. The fourth was not called to testify.

I have learned through conversations with Officer Young and other members of the Narcotics Bureau that Officer Young's and Officer Mulcahy's parts in the investigation at the Princess Bar was greatly curtailed after this courtroom showing that the buy of marijuana never came off and many connections made by these officers at this location were lost.

WILLIAM CAHN
District Attorney

By Richard M. Premisler
MICHAEL M. PREMISLER
Assistant District Attorney

LEGAL AID SOCIETY OF NASSAU COUNTY, N.Y.
CRIMINAL DIVISION
APPEALS BUREAU
400 County Seat Drive, Mineola, N. Y. 11501
(516) 248-5782

James J. McDonough
Attorney in Charge

July 1, 1974

Hon. Charles D. Breitel
Chief Judge
Court of Appeals
74 Trinity Place
New York, New York

RE: People v. Robert W. Lloyd
Leave Application

Dear Chief Judge Breitel:

In reply to the letter of Mr. Devine dated June 28, 1974 I would like to point out that the memorandum attached thereto and the letter itself reveal a misunderstanding of People v. Hinton. That case held that only a threat to the safety of an undercover agent can authorize the drastic remedy of a closed trial. A desire to maximize the usability of such agent and the success of police investigations is not an interest substantial enough to authorize such procedure.

The Greiner memorandum apparently seeks more than simply a closed courtroom. In both Lloyd and Greiner the public was excluded. The District Attorney would apparently also ask that no witnesses be present at the time of the alleged crime be permitted to view the officers. This, of course, is a point distinct from and irrelevant to the issue in our case, except that such a request betrays a narrow view of defendant's right to a fair trial.

Finally, Mr. Devine's letter carries a misconception of the right to public trial. He states that friends and relatives might be permitted to attend but not "total strangers." The right to public trial is not the right of defendant to have his friends attend his trial but more broadly a requirement that he and all persons charged with crimes be tried before all persons who may

"EXHIBIT C"

for whatever reason wish to witness the trial. It is the "total stranger" whose presence at a trial is more clearly sought to be protected. He is the impartial observer who can most appropriately protect the public's stake in fair and open trials.

Very truly yours,

James J. McDonough

By

Eugene Murphy
Appeals Bureau

EM/lh

CC:DD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendant, Green Haven Correctional Facility,

Respondent.

- - - - - - - - - - - - - - - - - - - -

74 C 1173

Memorandum of Decision and Order

January 10, 1975

This is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2241. In 1973, Robert W. Lloyd was convicted in Nassau County Court on two counts of selling a dangerous drug in the third degree. Mr. Lloyd is presently incarcerated at Green Haven Correctional Facility, serving two concurrent four year terms for this conviction. Having exhausted his state remedies, the petition is properly before the court. [1]

[1] Lloyd's conviction was affirmed without opinion by the Appellate Division 45 A.D.2d 936 (1974). Leave to appeal to the Court of Appeals was denied. 34 N.Y.2d 519 (1974).

6-a

FPI—SS—3-17-72—30M—9153

The basis of petitioner's claim is that his right to a public trial under the sixth amendment was violated when the public was excluded from the courtroom during most of his trial. Just prior to the presentation of its direct case, the prosecution requested that the courtroom be cleared of all spectators while two undercover agents testified.[2] In support of this request, the prosecutor stated that the exclusion was necessary in order to maintain the confidentiality of the agents, who were actively engaged in undercover work. Defense counsel objected strenuously to the exclusion, asserting the right to a public trial under the sixth amendment. On the basis of the prosecutor's assertion, the judge ordered the courtroom cleared of all spectators during the testimony of the two agents. At this time only one person was in the court.

After its ruling, the judge offered defense counsel an additional opportunity to present reasons why the courtroom should not be cleared. In the course of this

[2] The transcript of the entire discussion relating to the closing of the courtroom is appended to this memorandum of decision and order.

FPI—88—3-17-72—30M—9153

discussion, the judge stated that he had to weigh the defendant's constitutional rights against the countervailing need for confidentiality. As reasons in support of the request to close the courtroom the court cited the need to maintain the confidentiality of the agents' identity and the danger to their lives posed by testifying publicly. At no time, however, did the prosecution advance any claim that testifying in public might pose a threat to the agents' lives.

In response to the court's statements, defense counsel reasserted its right to a public trial and added that in its view there was no issue of confidentiality since the defendant and his girlfriend knew the agent and the only spectator in the courtroom was unknown to all the parties. In further support of this claim, the defendant and his girlfriend testified that they knew one of the undercover agents, and were aware that he worked for the Nassau County Police.

Petitioner contends that it was error to exclude the public solely on the basis of the prosecution's asserted need for confidentiality. The court agrees with this contention.

FPI—SS—3-17-72—30M—0153

The sixth amendment guarantee of a public trial is applicable to the states through the due process clause of the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968). The public trial requirement of the sixth amendment serves a twofold purpose. It safeguards the right of an accused to be dealt with fairly, and not to be unjustly condemned. Estes v. Texas, 381 U.S. 532, 539, 85 S.Ct. 1628 (1965). At the same time this guarantee perserves public trust in the judicial process by reducing the chances of perjury and by preventing the abuses of secret tribunals exemplified by the Inquisition, Star Chamber and lettre de cachet, In Re Oliver, 333 U.S. 257, 270 n. 24, 68 S.Ct. 499, 505 (1948). Thus, both the defendant and the public have a vital stake in the right to a public trial, which is embedded in and fundamental to our system of jurisprudence.

Despite the importance of this right, exclusion of the public, for limited purposes and for short periods, is sometimes justified in the public interest or in the interest of the defendant. Thus, in circumstances where there has been a demonstrated need to preserve order or to maintain the confidentiality of certain information, or

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where an actual risk of harm to witnesses exists, proceedings have been closed. E.g., Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966)(authorizing limitation of the press and media during the trial to protect the defendant); United States ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957, 90 S.Ct. 947 (1970)(some spectators removed to avoid harassment of witness); United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom Orlando v. Folette, 384 U.S. 1008, 86 S.Ct., 1961 (1966)(all spectators but press removed to preserve order); Geise v. United States, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842, 80 S.Ct. 94, 4 L.Ed. 2d 80 (1959)(most of spectators cleared in rape case where prosecutrix and two other witnesses were of tender years and a large audience would inhibit testimony); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1959)(general public excluded by state law in sex crime case where victim was a minor); United States v. Bell, 464 F.2d 667 (2d Cir. 1972) (public excluded during discussion of skyjacker profile).

In these instances, however, courts have been extremely careful to limit the exclusion to circumstances where real and compelling reasons necessitate it. E.g.,

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United States v. Clark, 475 F.2d 240, 246 (2d Cir. 1973). Thus, in United States ex rel. Bennett v. Rundle, 419 F.2d 599, 607 (3d Cir. 1969) the court stated that "any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." This same view was most recently repeated in Stamicarbon v. American Cyanamid Co., 74-1960 (2d Cir. October 4, 1974), where the court said that "[i]n almost all cases the interest which would suffer from publicity will merit less attention than the very real concern that the accused might be prejudiced by restricted attendance. It is only under the most exceptional circumstances that limited portions of a criminal trial may be even partially closed." Id. at 19. No such exceptional circumstances were shown to exist in this case.

In support of its claim that the exclusion was proper, the state relies on several cases in which the public was excluded in order to preserve order and assure the safety of the witnesses. United States ex rel. Bruno v. Herold, supra, and United States ex rel Orlando v. Fay, supra. In these cases, however, the witnesses were and actually threatened by persons in the courtroom only at this

point was the public excluded. In the present case, there was no real or apparent threat to the agents' safety. The only person in the courtroom was unknown and presented no discernible risk to the agents' confidentiality or safety.

Nor does this case present the same circumstances which prompted the court to exclude the public when an undercover agent took the stand in State v. Hinton, 31 N.Y. 2d 71 (1972). In Hinton, the court based its decision to exclude the public not only on the fact that the agent would sacrifice his confidentiality by testifying publicly, but also because his life would be put in jeopardy by doing so. The court emphasized the fact that other targets of the investigation were in the courtroom and as a consequence there was a real threat to the agent's life if he testified publicly. Id. at 73. Furthermore, the court specifically distinguished its exclusion order from other cases in which no such compelling need was shown and where the exclusions were therefore improper. Id. at 75.

In excluding the public, the court acted solely upon the untested assertion of the prosecution that the agent's confidentiality would be jeopardized. In failing to require a showing that the agents' confidentiality would

be jeopardized or that their lives would in fact be endangered, the trial court erred.

The right to a public trial is extremely important in our system of criminal justice, providing as it does a primary guarantee of a fair trial. A right of this significance should not rest upon such a fragile foundation as the trial court permitted. If courts were to base their decisions to exclude the public on mere assertions or requests, there is a grave danger that this right would be completely emasculated. Under such practice, the temptation toward perjury and similar abuses would be unchecked. In this case in particular, where the asserted basis for the exclusion was challenged by the defendant, the public trial requirement should not have been dispensed with.

Underlying the trial court's action was a fundamental misconception of the public trial right. The burden of showing that exclusion of the public is necessary must fall on the prosecution. In this case, the court reversed this burden by requiring the defense to give reasons why the courtroom should not be cleared once the prosecution requested it. It may be that in some circumstances, a limited exclusion would be justified to preserve a witnesses'

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confidentiality. However, that issue is not before the court.

This court holds that before exclusion of the public is permitted for any reason, the court must have a clear, convincing and compelling basis for its order. This basis may be established either by compelling circumstances within the court's knowledge, such as those present in Fay, Bruno and Hinton, or by an affirmative demonstration by the prosecution that such compelling reasons exist. Because no compelling reasons were known or presented to the trial court, its order was improper and the defendant must be granted a new trial.

There is no need to show that the defendant was actually prejudiced by the exclusionary order. United States ex rel. Bennett v. Rundle, supra, at 608. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949). Such a requirement would impose an impossible burden on a defendant, effectively depriving him of the protection of the right itself. Kobli at 921-23.

The petition is granted. The judgment of conviction is vacated and the state is directed to grant a new trial within 60 days from date or dismiss the indictment.

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The Clerk of the Court is directed to enter judgment vacating petitioner's conviction and granting him a new trial. The directions in this order and the judgment to be entered therein are stayed until January 31, 1975, to afford respondent an opportunity to seek review and a further stay.

Jacob Mishler
U. S. D. J.

FPI—8S—3-17-72—30M—9133

10

COUNTY COURT : NASSAU COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Ind. No. 34448

ROBERT W. LLOYD, a/k/a BOBBY LLOYD, :

Defendant. :

----------x 74-C-1173

Mineola, New York
September 4, 1973

B e f o r e :

HON. JOHN S. LOCKMAN,
County Court Judge
and a Jury

A p p e a r a n c e s :

ROGER HAUSCH, ESQ.
Assistant District Attorney
For the People

JOSEPH SCHULTZMAN, ESQ.
Attorney for Defendant

BERNARD SAMOWITZ, Official Court Reporter

- - - -

MINUTES OF TRIAL

- - - -

pages 86-96

want to thank you and I want to thank your Honor and thank the Assistant District Attorney.

MR. HAUSCH: Your Honor, pursuant to our conversation before the jury trial, before the jury selection commenced, I have an application at this time to make out of the presence of the jury.

THE COURT: All right, come up.

(Conference at the bench, not in the hearing of the members of the jury.)

THE COURT: Yes, Mr. Hausch.

MR. HAUSCH: Your Honor, the People's first two witnesses will be undercover agents. They are now actively undercover agents with the Narcotics Squad of the Nassau County Police Department. For this reason, I would ask that the Court be closed to any spectators. I would further ask that all witnesses for both sides, with the exception of the defendant, and any witness who is about to testify, be excluded.

THE COURT: Well, first of all, as to your request for all witnesses excluded, that's granted. As to your request that the courtroom be cleared, I understand you oppose that?

MR. SCHUTZMAN: I oppose it, Judge.

THE COURT: What is your opposition?

MR. SCHUTZMAN: My opposition is the basic one, that the trial should be public. It is the defendant's absolute right to have a public trial and the defendant demands that right.

THE COURT: Keep your voice down.

MR. SCHUTZMAN: In the absence of showing some prejudice, the courtroom must be open. The only one that will be prejudiced, I say respectfully, is the defendant, and the defendant demands that the courtroom be open to all spectators.

THE COURT: Mr. Schutzman, keep your voice down.

MR. SCHUTZMAN: I'm sorry. If I have been speaking louder, it's just that I am upset at this. I will try to speak lower. But it's my opinion that this should be within the hearing of the jury.

THE COURT: That what should be within the hearing of the jury?

MR. SCHUTZMAN: This.

THE COURT: You mean your application?

MR. SCHUTZMAN: Yes.

THE COURT: You mean this benchside conference?

MR. SCHUTZMAN: Yes.

THE COURT: Oh, no. No, no, Mr. Schutzman.

MR. SCHUTZMAN: Well, I make that application, that

this should be within the hearing of the jury, and I suppose your Honor will reject that?

THE COURT: Yes.

MR. SCHUTZMAN: And assuming that your Honor rejects it, I just would like to say that we are entitled to a trial under the Constitution of the United States, a trial that is exposed and open to the public, that is not private; and in the absence of any overriding reason, which certainly does not exist in this case --

THE COURT: He has referred to a reason, call it overriding or not, but that is the confidentiality of the two undercover agents.

MR. SCHUTZMAN: There is no confidentiality. The overriding reason seems to be the confidentiality of the two informants. I know their names. We have known their names all along. We know what they look like. There is no mystery here. There is no reason at all for keeping it private.

THE COURT: That isn't the point. He doesn't want people casually walking in and out of the courtroom and he wants to keep people out. As a matter of fact, there is only one person in the courtroom now, a lady. Do you know who the lady is?

MR. SCHUTZMAN: I don't know who that lady is.

THE COURT: Do you know who the lady is?

MR. HAUSCH: No.

MR. SCHUTZMAN: I don't know who the lady is. The only thing I request is that witnesses who will testify for the People, other than the one on the stand, should not be in the courtroom. Otherwise, I think it should be open to the general public.

THE COURT: In other words, you don't have any particular person you want in the courtroom, do you? You just want the public to be allowed to walk in and out when the undercover people testify? That's your position?

MR. SCHUTZMAN: Yes. I want the absolute right to a public trial.

THE COURT: You want a public trial?

MR. SCHUTZMAN: Precisely.

THE COURT: All right, the application of the People is granted.

MR. HAUSCH: Thank you, your Honor.

MR. SCHUTZMAN: May your Honor note my exception for the record?

THE COURT: Of course.

(The following occurred in open court:)

THE COURT: The courtroom will be cleared and no one

is to be allowed in or out during the testimony of the two police officers.

MR. SCHUTZMAN: Your Honor will note my exception?

THE COURT: Yes.

MR. SCHUTZMAN: If I may, your Honor, I have something else.

THE COURT: Yes.

(Conference at the bench, not in the hearing of the members of the jury.)

THE COURT: Yes, Mr. Schutzman?

MR. SCHUTZMAN: I would like the record to reflect my objection to this whole procedure on the further ground that your Honor has just informed the jury -- at least your Honor made the announcement that no one would be allowed in or out. The jury heard that, and at this time I can't assess the effect of that statement that your Honor made upon the jury, but I can't see how in the world it can help my client. I think it is prejudicial to him, although at the present time I am not able to state how. It's just the fact that I think the jurors know that these trials are public, that they are open to everyone, and now there is a closed courtroom, and I don't think this will inure to the benefit of my defendant at all.

THE COURT: Tell you what, Mr. Schutzman, would you like me to have the reporter read the conference at the bench to the jury?

MR. SCHUTZMAN: You want to read this to the jury?

THE COURT: Yes.

MR. SCHUTZMAN: At this point?

THE COURT: Yes. It's up to you.

MR. SCHUTZMAN: Your Honor has already ruled. What difference does it make? I mean, at this point I feel the damage or the prejudice has already been accomplished.

THE COURT: Well, I don't understand your appli a-tion. You want to make this public and then you object to the announcement that I made. We can't operate in a vacuum. We had a conference before at the bench and we are having one now. If you like, I will have the reporter read your application, where you object on the basis of the Constitution and whatnot, and then your position will be made known to the jury. If you want, we will read it to the jury.

MR. SCHUTZMAN: No, no, we might as well proceed. My objection is to closing the courtroom.

THE COURT: Yes, I understand that. You have an exception. Now, do you want the conversation that we had on this motion read to this jury?

MR. SCHUTZMAN: I would like to have full argument on it, rather than just read this. That I will accept. That I will take.

THE COURT: No, no, I am not going to have an argument. I have already ruled on it. I have already ruled that the courtroom will be closed during the testimony of the two undercover agents. Now, if you want this read to the jury, I will direct the reporter to read it to the jury.

MR. SCHUTZMAN: No, I don't want it read. I would not request that it be read, not in the restrictive sense that this has taken place. I would like argument on the very subject, the very same subject before the jury.

THE COURT: No, no, that application is denied.

MR. SCHUTZMAN: Okay, exception.

THE COURT: Yes.

MR. SCHUTZMAN: I have an exception?

THE COURT: Yes.

MR. HAUSCH: Your Honor, I ask Mr. Sandback to get my witness. He should be on the way up now.

MR. SCHUTZMAN: What was that? I missed that.

THE COURT: He said he asked Mr. Sandback to get the witness.

MR. HAUSCH: I have him in the office and I have asked my associate to get him up.

MR. SCHUTZMAN: Oh, I see.

MR. HAUSCH: It would just be a moment.

THE COURT: All right, fine.

(The following occurred in open court:)

THE COURT: While we are waiting, would you come up, gentlemen, and with the court reporter.

(Conference at the bench, not in the hearing of the members of the jury.)

THE COURT: Mr. Schutzman, please keep your voice down. You say you wanted full argument. You mean there is something you haven't told me, a reason why you would not want this courtroom opened?

MR. SCHUTZMAN: No, I think, Judge, the harm has already been done by the conferences at the bench and your Honor's ruling. Your Honor's rulings, I should say. So whatever happens, happens.

THE COURT: No, I want to know, is there any other reason why you have, why this courtroom should be open?

MR. SCHUTZMAN: No, I have no others.

THE COURT: You see, you have spread upon the record your feelings about this. I respect your feelings. I have to weigh the constitutional rights of your client

as against the confidentiality of these undercover agents, the danger to their lives, etc., the continuing investigation that they are undertaking, etc. As I say, I have to weigh both sides of this. It is true that your client does have a contstitutional right to an open courtroom. However, when circumstances become evident to justify closing the courtroom, then I must close the courtroom. That is the court's position at this time. I am asking you, you wanted full argument, so I am asking you, do you have anything else that you wish to offer?

MR. SCHUTZMAN: No. I am relying on my constitutional rights. The point is always -- you see, Judge, supposing for a minute --

THE COURT: Keep your voice down.

MR. SCHUTZMAN: I don't think they can hear me.

THE COURT: Just try to keep your voice down.

MR. SCHUTZMAN: All right, I'm sorry. I think that the next step, the next logical extension of this, is to cover these people with masks and things of that sort. The purpose of a public trial is just that, so that somebody may come in there and recognize them, and not to perpetuate this sort of stuff, this sort of thing. This is not the Soviet Union. It's a public trial. The

fact that it's a public trial alone -- a public trial means a public trial, and I think at this point this is not a public trial, and I have made my position abundantly clear for the record, and I don't wish to belabor the point. Your Honor has ruled and I feel that the damage has been done and all I can do is note my exception on the record.

THE COURT: All right, let's proceed then. I thought you had something else. I thought you had other argument to offer to the Court.

MR. SCHUTZMAN: Your Honor has already ruled in these conversations at the bar. I don't really think it would matter that you now give me the privilege of saying these same things before the jury.

THE COURT: No, no, no, I am not suggesting you say it before the jury. But after you went back and sat down, I recalled what you said, and I want to make sure that I am not precluding you from offering to the Court any other reasons as to why you think the public should be allowed while these two undercover narcotics agents testify. I couldn't recall any other reason you gave other than your right to a public trial. Was there any other reasons other than what you have set forth?

MR. SCHUTZMAN: No.

THE COURT: What I wanted to do is to give you that opportunity, if you want to avail yourself of it.

MR. SCHUTZMAN: My furnishing reasons would tend to shift the burden upon the defendant, and I think that would be appropriate. But, in any event, I have my exception in the record.

THE COURT: Yes, you certainly do.

MR. SCHUTZMAN: And Judge, I'm sorry, I don't intend to talk loudly. You know, I guess we all get carried away.

THE COURT: I know that. Listen, you are a gentleman and you have always been a gentleman. So has Mr. Hausch.

(The following occurred in open court:)

MR. HAUSCH: People call Patrolman Knorland Carroll.

P A T R O L M A N K N O R L A N D C A R R O L L, Shield 988, Narcotics Bureau, Nassau County Police Department, being called as a witness in behalf of the People, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HAUSCH:

Q Patrolman Carroll, how long have you been a member of the Nassau County Police Department?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.
JAN 27 1975
TIME A.M.
P.M.

UNITED STATES OF AMERICA EX REL.
ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent,
GREEN HAVEN CORRECTIONAL FACILITY,

Respondent.

NOTICE OF MOTION FOR A STAY PENDING APPEAL

74 C 1173

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Assistant Attorney General Burton Herman, sworn to the 27th day of January 1975 and upon the papers and proceedings previously had herein, the undersigned will move this Court, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York for an order staying the execution of the order of this Court dated January 10, 1975 pending the determination of an appeal to the United States Court of Appeals, Second Circuit from this order, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
January 27, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Superintendent of
Green Haven Correctional Facility
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. 488-7410

By Burton Herman, Assistant Attorney General

TO: MR. EUGENE MURPHY
James J. McDonough, Esq.
Legal Aid Society of
Nassau
400 County Seal Drive
Mineola, New York 11501

(7)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA EX REL. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent, GREEN HAVEN CORRECTIONAL FACILITY,

Respondent.

----------X

AFFIDAVIT

74 C 1173

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BURTON HERMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for Leon J. Vincent, Superintendent of Green Haven Correctional Facility. I make this affidavit in support of motion for a stay of the execution of this Court's order dated January 10, 1975. This order reads as follows:

> "The petition is granted. The judgment of conviction is vacated and the state is directed to grant a new trial within 60 days from date or dismiss the indictment...the directions in this order and the judgment to be entered therein are stayed until January 31, 1975 to afford respondent an opportunity to seek review and a further stay."

Petitioner contended that his right to a public trial was violated, and this Court agreed with his contention. Petitioner raised the same claim in the state courts. The Appellate Division, Second Department affirmed the judgment and leave to appeal to the New York Court of Appeals was denied. A conflict has arisen on the issue between the state courts and

this Court which should be reviewed and resolved by the United States Court of Appeals for the Second Circuit, and in this situation a stay of the order pending appeal is justified.

The State has a very serious problem in recruiting and maintaining undercover police narcotic agents and in maintaining their confidentiality and safety while they are still involved in undercover activit[illegible] Accordingly, its intention is to forthwith proceed [illegible]n appeal.

Rule 8 of the Federal Rules of Appellate Procedure provides that an application for a stay of an order of a District Court pending appeal must ordinarily be made in the first instance in the District Court. Moreover, upon information and belief, the earliest date that the United Court of Appeals for the Second Circuit would be available for hearing an application for a stay pending an appeal in the event that the present motion is denied is February 11, 1975.

WHEREFORE, your deponent respectfully requests that the within application for a stay of the execution of the order pending the determination of the appeal be granted, or in the alternative, if the application be denied, that the order be stayed until February 11, 1975 to afford an opportunity to make the application to the United States Court of Appeals for the Second Circuit.

Burton Kerman

Sworn to before me this
27th day of January, 1975

Eugene P. Dwyer

Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent Green Haven Correctional Facility,

Respondent.

----------X

NOTICE OF APPEAL
74 C 1173

FILED
JAN 31 | 42 PM '75
CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

S I R :

NOTICE IS HEREBY GIVEN that respondent hereby appeals to the United States Court of Appeal for the Second Circuit from the order of the Court dated January 10, 1975 vacating judgment of conviction and directing the State to grant a new trial within 60 days from date or dismiss the indictment.

Dated: New York, New York
January 31, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, N. Y. 10047
By:

Burton Herman
BURTON HERMAN
Assistant Attorney General

TO: MR. EUGENE MURPHY
JAMES J. McDONOUGH, ESQ.
Legal Aid Society of Nassau
400 County Seat Drive
Mineola, N. Y. 11501

(8)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. ROBERT W. LLOYD,

Petitioner,

-against-

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent.

----------X

ORDER

74 C 1173

The motion of the respondent dated January 27, 1975 is granted and the order of the Court dated January 10, 1975 is hereby stayed pending the determination of an appeal to the United States Court of Appeals for the Second Circuit from this order.

Dated: Brooklyn, New York
January 30, 1975

U. S. D. J.

(9)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANNA M. VELEZ , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellant herein. on the 3rd day of March , 1975, she served the annexed upon the following named person :

EUGENE MURPHY, ESQ.
James J. McDonough, Esq.
Legal Aid Society of Nassau
400 County Seat Drive
Mineola, New York 11501

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ann M. Velez

Sworn to before me this
3rd day of March, , 1975

Burton Herman
Assistant Attorney General
of the State of New York